

**REDACTED DECISION - DOCKET NUMBER 11-051 P – BY A.M. “FENWAY”
POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE - SUBMITTED FOR DECISION
ON OCTOBER 17, 2011 - ISSUED ON MARCH 20, 2012**

SYNOPSIS

TAXATION--PROCEDURE AND ADMINISTRATION--It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS--BURDEN OF PROOF--In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

PERSONAL INCOME TAX--IMPOSED ON WEST VIRGINIA TAXABLE INCOME OF INDIVIDUALS--Each year a tax is imposed, based upon a rate set by the legislature, on the West Virginia taxable income of every individual, estate and trust. *See* W. Va. Code Ann. § 11-21-3 (West 2010).

PERSONAL INCOME TAX--WEST VIRGINIA TAXABLE INCOME DEFINED--“[T]he West Virginia taxable income of a resident individual shall be his West Virginia adjusted gross income, less his personal exemptions, as determined under this part.” W. Va. Code Ann. § 11-21-11(a) (West 2010).

PERSONAL INCOME TAX--RESIDENT INDIVIDUAL DEFINED--“Resident individual means an individual: (1) Who is domiciled in this State, unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State” W. Va. Code Ann. § 11-21-7(a) (West 2010).

WEST VIRGINIA SUPREME COURT OF APPEALS--ESTABLISHING DOMICILE--“Two things must concur to establish domicile, -- the fact of residence, and the intention of remaining. . . . A person does not lose his residence by leaving it with an uncertain, indefinite, half-formed purpose to take up residence elsewhere, and until his purpose to remain has become fixed, he does not abandon his former residence” Lotz v Atamaniuk, 172 W. Va. 116, 118, 304 S.E.2d 20, 23 (1983).

PERSONAL INCOME TAX--RESIDENT INDIVIDUAL--The Petitioner maintains no permanent place of abode, either in West Virginia or outside of West Virginia.

PERSONAL INCOME TAX--PETITIONER NOT DOMICILED IN WEST VIRGINIA--Petitioner’s purpose to remain outside of West Virginia is fixed.

WEST VIRGINIA OFFICE OF TAX APPEALS--PETITIONER'S BURDEN OF PROOF MET--As such, the Petitioner has carried his burden of proving that he was not a resident individual of West Virginia in 2005. Therefore, the personal income tax assessment issued against him on January 20, 2011, was in error.**WEST VIRGINIA OFFICE OF TAX APPEALS--PETITIONER'S APPEAL OF ASSESSMENT FOR TAX YEAR 2007 NOT TIMELY FILED**--The Petitioner failed to timely appeal the personal income tax assessment issued against him on July 20, 2009, for tax year 2007. As such, that assessment has become final.

FINAL DECISION

On July 20, 2009, the Compliance Division of the West Virginia State Tax Commissioner's Office (hereinafter, Tax Department or Respondent) issued a Personal Income Tax Assessment against the Petitioner. This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.* of the West Virginia Code. The assessment stated that Petitioner had failed to pay West Virginia personal income tax for tax year 2007, in the amount of _____. The assessment included a penalty of \$_____ and interest of \$_____, for a total assessment of \$_____. Thereafter, on January 20, 2011, the Compliance Division issued a second assessment against the Petitioner. This assessment was also for personal income tax, for tax year 2005, and was for tax in the amount of \$_____, penalties of \$_____ and interest of \$_____, for a total assessment of \$_____.

The Petitioner filed his Petition for Reassessment with this Tribunal on February 16, 2011. Subsequently, notice of a hearing on the petition was sent to the Petitioner and in accordance with the provisions of West Virginia Code Section 11-10A-10, a hearing was held on October 17, 2011, and the matter became ripe for decision at the conclusion of the same.

FINDINGS OF FACT

1. Until December 2001, the Petitioner was a resident of West Virginia.

2. In December of 2001, the Petitioner moved outside of West Virginia to take a job in the railroad construction business. The Petitioner has been employed in the railroad construction business since that time.

3. Since December 2001, the Petitioner has moved around the country extensively, living in apartments or hotels.

4. Since December 2001, the Petitioner has not lived anywhere with the intention of permanently staying.

5. Since December 2001, the Petitioner has had no intention of returning to live in West Virginia.

6. Since December 2001, the Petitioner has only visited West Virginia three times.

7. For much of the period between December 2001 and the present, the Petitioner maintained some connection with West Virginia. For much of that period he had a West Virginia driver's license; he paid personal property tax in West Virginia on a personal vehicle; he received mail at a post office box in West Virginia and he owned real property in West Virginia.

DISCUSSION

At the beginning of the evidentiary hearing in this matter the Petitioner conceded that the July 20, 2009, assessment for tax year 2007, had been mailed to his proper mailing address and that he had not timely appealed the same.

The law regarding personal income tax that applies to this matter is clear. Each year a tax is imposed, based upon a rate set by the legislature, on the West Virginia taxable income of every individual, estate and trust. *See* W. Va. Code Ann. § 11-21-3 (West 2010). West Virginia taxable income is discussed in Section 11 of Article 21, and states: “[T]he West Virginia taxable

income of a resident individual shall be his West Virginia adjusted gross income, less his personal exemptions, as determined under this part.” W. Va. Code Ann. § 11-21-11(a) (West 2010).¹ A resident individual is defined as:

Resident individual means an individual: (1) Who is domiciled in this State, unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State, or (2) Who is not domiciled in this State but maintains a permanent place of abode in this State and spends in the aggregate more than one hundred eighty-three days of the taxable year in this State.

W. Va. Code Ann. § 11-21-7(a) (West 2010).

The Tax Commissioner contends that the Petitioner is a resident individual, and therefore has West Virginia taxable income, because he is domiciled in West Virginia.

At first glance, this matter would appear to be capable of simple resolution by ruling that the Petitioner maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State. Clearly, in 2005, the Petitioner had no permanent place of abode in West Virginia and spent less than thirty days in the state. However, the Tax Commissioner contends that because the Petitioner does not have a permanent place of abode elsewhere, the question of whether the Petitioner is domiciled in West Virginia is a fair one.

The West Virginia Supreme Court of Appeals has discussed domicile many times, going back over one hundred years.

Domicile and residence are not synonymous. *Shaw v. Shaw*, 155 W.Va. 712, 187 S.E.2d 124 (1972). A man may have several residences, but only one domicile. Nonetheless, courts frequently interchange the words, as do legislatures. See ***119** *Patterson v. Patterson*, 167 W.Va. 1, 277 S.E.2d 709, 717 (1981). Cases that we quote in which the word

¹ Sections 30-44 of Article 21 deal with non-resident individuals; however in this matter, the Tax Commissioner contends that the Petitioner is a resident individual.

“residence” is used clearly mean what we mean by “domicile”. Our law about domicile dates to 1888. In *White v. Tennant*, 31 W.Va. 790, 8 S.E. 596, 597, we stated: “Two things must concur to establish domicile,-the fact of residence, *and the intention of remaining*. These two must exist, or must have existed, in combination.... The character of the residence is of no importance; and if domicile has once existed, mere temporary absence will not destroy it, however long continued.” (Emphasis supplied.)

“The question of residence is one of intention, and the old residence is not considered as lost or abandoned as long as the *animus revertendi* remains.” *Maslin's Executors v. Hiatt*, 37 W.Va. 15, 16 S.E. 437, 439 (1892). We elaborated in *State ex rel. Linger v. County Court of Upshur County*, 150 W.Va. 207, 144 S.E.2d 689, 702-703 (1965):

“Two fundamental elements are essential to create a residence, and these elements are: (1) Bodily presence in a place. (2) The intention of remaining in that place. Residence is thus made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of acts and intention. Neither bodily presence nor intention alone will suffice to create a residence. There must be a combination and concurrence of these elements and when they occur, and at the very moment they occur, a residence is created.” ... A person is not considered to have lost his residence when he leaves his home and goes into another state, territory or county, for temporary purposes merely, with the intention of returning.... A person does not lose his residence by leaving it with an uncertain, indefinite, half-formed purpose to take up residence elsewhere, and until his purpose to remain has become fixed, he does not abandon his former residence.

Lotz v Atamaniuk, 172 W. Va. 116,118, 304 S.E.2d 20, 23 (1983).

While not saying it directly, the Tax Commissioner suggests that because the Petitioner kept the ties to West Virginia discussed above, he clearly had an intention to return to West Virginia. However, that theory is refuted by the Petitioner’s clear testimony that he has no intention of ever returning to West Virginia to live. The Petitioner’s testimony is bolstered by the fact that he has not lived in West Virginia for over a decade, and has only visited the state three times, during that ten years. Moreover, this matter concerns whether the Petitioner was domiciled in West Virginia during tax year 2005, six years in the past. If the Petitioner had returned to live in West Virginia sometime after 2005, then the question about his intentions

would be laid to rest. However, the Petitioner has not done that, and at the time of the evidentiary hearing his testimony regarding his future intentions was un-rebutted. In fact, the Petitioner sold his real property in West Virginia, prior to the issuance of his 2005 personal tax assessment. That also bolsters his testimony regarding his intention never to return. Simply put, the Petitioner's version of events does not strain credibility. The undersigned does not find it incongruous that a person similarly situated to the Petitioner would keep minimal ties to their home state, in the form of a driver's license, ownership of property and receipt of mail, despite the intention to never live in that state again. Since his departure over ten years ago, the Petitioner's purpose to remain outside of West Virginia has become fixed, as that term is used in Lotz, supra. As such, he could not have been domiciled in West Virginia in 2005.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003)

3. Each year a tax is imposed, based upon a rate set by the legislature, on the West Virginia taxable income of every individual, estate and trust. *See* W. Va. Code Ann. § 11-21-3 (West 2010).

4. “[T]he West Virginia taxable income of a resident individual shall be his West Virginia adjusted gross income, less his personal exemptions, as determined under this part.” W. Va. Code Ann. § 11-21-11(a) (West 2010).

5. “Resident individual means an individual: (1) Who is domiciled in this State, unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State” W. Va. Code Ann. § 11-21-7(a) (West 2010).

6. “Two things must concur to establish domicile, -- the fact of residence, *and the intention of remaining*. . . . A person does not lose his residence by leaving it with an uncertain, indefinite, half-formed purpose to take up residence elsewhere, and until his purpose to remain has become fixed, he does not abandon his former residence” Lotz v Atamaniuk, 172 W. Va. 116, 118, 304 S.E.2d 20, 23 (1983).

7. The Petitioner maintains no permanent place of abode, either in West Virginia or outside of West Virginia.

8. The Petitioner’s purpose to remain outside of West Virginia is fixed.

9. As such, the Petitioner has carried his burden of proving that he was not a resident individual of West Virginia in 2005. Therefore, the personal income tax assessment issued against him on January 20, 2011, was in error.

10. The Petitioner failed to timely appeal the personal income tax assessment issued against him on July 20, 2009, for tax year 2007. As such, that assessment has become final.

11. Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the personal income tax assessment, issued against the Petitioner on January 20, 2011, for a total tax due of \$____, is hereby **VACATED**. It is **FURTHER DECIDED** that

the personal income tax assessment, issued against the Petitioner on July 20, 2009, for a total tax due of \$____, was never timely appealed, and as such has become final.

Pursuant to West Virginia Law, interest accrues on the assessments until the liabilities are fully paid. See W. Va. Code Ann. § 11-10-17(a) (West 2010).